Supreme Court, U.S.
FILED

02 974 DEC 18 2002

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No. _____

In the Supreme Court of the United States

SALLY DOE, as Next Friend of JANE DOE, a minor
Petitioners,

v.

ROSEVILLE COMMUNITY SCHOOLS, JOHN KMENT, FRANK MAYER, BETTY SLINDE, LEROY HERRON, and DOROTHEA SUE SILAVS, in their individual and official capacities, jointly and severally,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED FOR REVIEW

1. Under the collateral order doctrine as construed by this Court in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which allows for immediate appellate review of a district court ruling on qualified immunity, does a federal court of appeals have jurisdiction to consider an interlocutory appeal which does not argue qualified immunity, but which, instead, involves only an attack on the merits of the Petitioner's claims?

2. Assuming the Sixth Circuit had jurisdiction to consider the questions of deliberate indifference and causation, did that Court err in concluding that Respondents were entitled to summary judgment on these issues?

PARTIES TO THE PROCEEDING

Petitioner

Sally Doe, as next friend of Jane Doe, a minor, have no corporate affiliations.

Respondent

Roseville Community Schools, John Kment, Frank Mayer, Betty Slinde, Leroy Herron, and Dorothea Sue Silavs, in their individual and official capacities, jointly and severally.

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The September 19, 2002 Order of the United States Court of Appeals for the Sixth Circuit denying Petitioners' Motion for Rehearing and Suggestion for Rehearing En Banc is not officially reported. That Order is reproduced in the attached Appendix, beginning at page 1a.

The July 16, 2002 Opinion of the United States Court of Appeals for the Sixth Circuit is reported, *Doe v. City of Roseville, et al*, 296 F.3d 431 (2002). That Opinion is reproduced in the attached Appendix, beginning at page 3a.

The Sixth Circuit's June 12, 2001 Order denying Petitioner's request to dismiss Respondents' appeal on jurisdictional grounds is not reported. That Order is reproduced in the attached Appendix, beginning at page 23a.

The oral decision of the United States District Court for the Eastern District of Michigan denying Respondents' Motion for Summary Disposition is not officially reported. That opinion is reproduced in the attached Appendix, beginning at page 28a. The district court's Order Denying Defendants' Motion for Summary Judgment is reproduced in the attached Appendix, beginning at page 26a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its decision in this case on July 16, 2002. Petitioner filed a timely Motion for Rehearing and Suggestion for Rehearing En Banc. That motion was denied by the Sixth Circuit in an Order dated September 19, 2002 (App. 1a). This Court's jurisdiction is being invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

John Lomnicki had been teaching in the Roseville school system for thirty years when he sexually assaulted Petitioner Jane Doe during the 1992-93 school year, when Jane Doe was a kindergarten student in the Roseville Community Schools. For at least half of Lomnicki's thirty year career in the Roseville Schools, the school district through its supervisory employees had actual, documented knowledge of his history of improperly touching young girls. The school district and its agents did nothing to protect these children.

Lomnicki's inappropriate touching of female students was first reported to school authorities during the 1975-76 school year after he put his hands up one fourth grade girl's shirt and he also put his hands down the back of another fourth grader's pants, inside her underwear. These incidents were reported to Elizabeth Slinde, the school's principal.

Slinde called at least five girls from that fourth grade class into her office, and asked them each about Lomnicki touching them. One of the girl's demonstrated to Slinde the manner in which Lomnicki put his hand down her pants. Slinde was later to testify that she "did not doubt that what [this fourth grade girl] said that [Lomnicki] did was what he evidently did." Despite this fact, Slinde concluded that the act of a male teacher putting his hand inside a fourth grade girl's pants did not constitute sexual harassment. Slinde did not discipline Lomnicki or report these incidents to the School District's top administrators, nor did she document them in any way. Slinde took no action to monitor Lomnicki's behavior or to ensure that children who had contact with him would be protected. Instead, she merely met with Lomnicki and advised him to be "very careful" not to touch any children inappropriately.

At this point in time, it was common knowledge among the students assigned to Lomnicki's classroom that Lomnicki liked to touch his female students. One of his female students recounted that when she was assigned to Lomnicki's class for the 1976-1977 school year, she was advised by an older student not to wear dresses to school because of Lomnicki's tendency to put his hands up girls' dresses. These warnings proved accurate. During the year that this student was assigned to Lomnicki's class, Lomnicki repeatedly put his hands up her shirt or dress, touched her

buttocks and her underwear, rubbed her back, and made her sit on his lap during school.

During that same school year, another fourth grade girl assigned to Lomnicki's class was also molested by him. Lomnicki would frequently lift this girl up and put his tongue in her mouth. He would also grab her by the inner thigh and pull her close to him. This student also witnessed Lomnicki doing similar things to other girls in his class.

During the 1976-1977 school year, these two children and several other girls reported to Slinde what Lomnicki was doing to them. As one of the students who participated in this meeting later recounted, Slinde told them that what Lomnicki was doing to them was "not so bad." Slinde also told the girls who had complained of Lomnicki's conduct that they should not talk about it further or tell their parents because, if they did, Lomnicki "would get in a lot of trouble, go to jail and die there." For a second straight year Slinde was made aware of Lomnicki's fondling of a number of his female students. Yet, Slinde still took no action against Lomnicki. As with the complaints lodged against Lomnicki during the previous school year, Slinde took no further action against him and the concerns expressed by the female students were neither documented nor communicated to other school officials.

Some time after these incidents came to light, Lomnicki was transferred to Kaiser Elementary School. While there he continued his criminal sexual conduct. In March 1979, four sixth grade girls at Kaiser Elementary School reported to the school's principal that Lomnicki had fondled their breasts at school. The girls' parents took their complaints directly to the school district's Superintendent, Frank Mayer, and the Deputy Superintendent of Schools,

Leroy Herron. After a brief interview of the students, Mayer concluded only that Lomnicki had exercised "poor judgment" and he placed a written reprimand in a sealed envelope in Lomnicki's file. All the records of whatever investigation occurred and whatever was reported to the Board of Education about this incident have since disappeared without explanation.

Immediately after this incident, Lomnicki was again transferred, this time to Arbor Elementary School, where he was assigned to a federally funded remedial reading program. In that position, Lomnicki provided one-on-one instruction to students in a private classroom of his own. The reprimand which had led to Lomnicki's transfer had warned that "future instances" of similar misconduct would lead to more severe disciplinary action, including discharge. Despite this warning, administrators at Arbor Elementary were not advised of the written reprimand which Mayer had issued to Lomnicki or of the charges which led to that reprimand.

The next reported incident of Lomnicki's sexual misconduct occurred in January 1988 when six sixth grade girls at Arbor Elementary reported to their principal that Lomnicki was inappropriately touching, rubbing and hugging them, rubbing his chest with their hands and putting his hands in their pockets and under their pants. While the 1988 incident represents the next documented complaint against Lomnicki, the students involved described Lomnicki's misconduct as continuous and notorious. One of Lomnicki's students later testified that it was "just like common knowledge" that Lomnicki liked to touch his female students and that he touched them every chance he got. Lomnicki's habit of unwanted touching of female students was so well known that sixth grade girls were compelled to employ a

"buddy system" to ensure that they would never be alone in a room with Lomnicki.

The reports of fondling which surfaced in 1988 when the six girls complained were again brought to the attention of Mayer, the district's Superintendent, and Herron, his Deputy. Herron conducted an investigation into the incidents. In the course of that investigation he interviewed only three of the six girls who had reported being fondled by Lomnicki, and he met with Lomnicki. Herron issued another written reprimand which specified that Lomnicki had exercised "poor judgment." This second reprimand was again placed in a sealed envelope in Lomnicki's personnel file. The only other action taken against Lomnicki was that he was transferred from Arbor Elementary to another primary school in the district, Eastland Elementary School. Despite the serious complaints lodged against Lomnicki and despite a second sealed reprimand, again no information about any of Lomnicki's history was communicated to his new supervisors at Eastland Elementary. At Eastland Elementary, Lomnicki was again assigned to the remedial reading program which afforded him private, individualized access to young students.

Jane Doe entered kindergarten at Eastland Elementary in the fall of 1992. Lomnicki was assigned to provide individualized reading instruction to her. Between October 1992 and March 1993, Lomnicki sexually assaulted and digitally penetrated Jane Doe, then age five. The timing of Lomnicki's assaults of Jane Doe is important since these assaults occurred at virtually the same time that Lomnicki's sexual misconduct was first being exposed publically.

Approximately ten years before, in 1982, Lomnicki offered one of his neighbors that he would provide free tutoring for her ten year old daughter. From 1982 through

1984, Lomnicki provided private tutoring sessions to this child, Sarah Williams. During these sessions, Lomnicki systematically and repeatedly molested Ms. Williams. Lomnicki repeatedly kissed Ms. Williams' body, undressed her, touched her private areas, and performed oral sex on her.

It was not until years later, in December 1992, that Ms. Williams could bring herself to report Lomnicki's abuse to the Warren Police Department. Thus, Ms. Williams instituted a criminal investigation of Lomnicki at the same time that Jane Doe was receiving individualized instruction from Lomnicki and at the same time that Jane Doe was being sexually abused by Lomnicki.

In early January 1993 representatives of the school district became aware of the Warren Police Department's investigation of Lomnicki. Despite actual notice of the ongoing investigation into Lomnicki's sexual assault of a young girl, the school district and its agents still took no immediate steps against him. They did not attempt to obtain more information about the ongoing criminal investigation, nor did they do anything to protect students such as Jane Doe, who were then being taught on a one-on-one basis by Lomnicki.

The School District's Deputy Superintendent in charge of personnel matters, Frank Mancina, was first contacted by a police officer on January 6, 1993. The officer wanted to see Lomnicki's personnel file, particularly any information in that file having to do with Lomnicki touching children. The School District's attorney advised Mancina to respond to the police inquiry by telling the officers to obtain a search warrant or court order for the release of Lomnicki's personnel file. The district's attorney also advised Mancina to tell the police who were investigating Lomnicki that, "we do have some

information so that they wouldn't be wasting their time getting a search warrant."

In March 1993, two months after learning that Lomnicki was under criminal investigation for the molestation of Sarah Williams, the School District finally removed Lomnicki from the classroom. During this two month period, Lomnicki continued to have regular one-on-one access to Jane Doe. Shortly thereafter, Lomnicki was arrested and charged with first degree criminal sexual conduct. The District's Superintendent, John Kment, issued a statement to the news media shortly after Lomnicki's arrest, indicating "We're very surprised. His career in Roseville has been very positive."

Between October 1992 and March 1993, when Lomnicki was finally removed from the classroom, Lomnicki took Jane Doe into his classroom, the boys' bathroom and/or the school library where he sexually assaulted and digitally penetrated her. Lomnicki put on a mask, tied her hands, struck her with a small bat, and threatened to kill her if she ever told anyone about what he was doing to her.

Because Lomnicki had threatened to kill Jane Doe if she told anyone, the five year old girl was afraid to tell anyone what he had done to her. Jane Doe did, however, immediately started to exhibit symptoms of child sexual abuse, *i.e.*, increased behavioral problems, extreme neediness, notable anxiety, difficulty concentrating, outbursts, nervousness and recurring nightmares about "the bad man" chasing her. A school psychologist to whom Jane Doe was referred observed that by May 1994, Jane Doe was exhibiting many emotional symptoms consistent with severe trauma such as a sexual assault.

It was not until November 1994 that Jane Doe was able to confide in her mother, Sally, that her kindergarten reading teacher, Lomnicki, had sexually assaulted her. Sally reported to Roseville School administrators what Lomnicki had done to her daughter. By this time, agents of the school district were well aware that the criminal case against Lomnicki arising out of his sexual assault of Sarah Williams, was proceeding to trial. Although he was no longer in the classroom, Lomnicki was at this time still employed by the Roseville Schools.

Despite knowledge of the pending criminal case against Lomnicki and despite Jane Doe's identification of her "reading teacher" as the person responsible for the sexual assaults, the district's supervisory officials attempted to deflect responsibility for these assaults away from Lomnicki. The District's Special Education Director, Sue Silavs, filled out a Department of Social Services (DSS) form reporting the abuse allegation to Michigan Department of Social Services pursuant to the requirements of a Michigan statute. In that report Silavs acknowledged that this "...student has recently alleged that a reading teacher abused her two years ago." Yet, where the form requested the identity of the "alleged perpetrator," Silavs wrote, "unknown - but possibly in household." Silavs further indicated in her report that "circumstances are unlikely and child is inconsistent." She included these conclusions in her report despite the fact that she had not talked to Jane Doe, Sally Doe or Lomnicki about the sexual abuse allegations. Nor did Silavs note in her report that Lomnicki had been reprimanded twice by the school district for inappropriately touching students or indicate that Lomnicki had already been charged with first degree criminal sexual conduct in the Sarah Williams case. Silavs later testified that she knew that the "reading teacher" whom Jane Doe had identified as her abuser was Lomnicki and that she

knowingly withheld his name from the Department of Social Services. Silavs further acknowledged that her statement in the DSS Report that the abuser was someone in Jane Doe's household was not based on any facts in her possession.

In 1995, Lomnicki was tried for his sexual assaults of Ms. Williams. He was convicted of first degree criminal sexual conduct and was sentenced to 18 to 36 years in prison. Lomnicki is presently serving that sentence.

On May 28, 1999, Sally Doe, as Next Friend of Jane Doe, filed this action against Lomnicki, the Roseville School District and five agents of the Roseville Schools, Slinde, Mayer, Herron, Kment and Silavs (hereinafter: "Respondents"). This cause of action was brought under 42 U.S.C. §1983 and Title IX, 20 U.S.C. §1681(a), seeking damages for violation of constitutional rights and violation of statutory duties which resulted in severe and permanent emotional injuries to Jane Doe.

Following extensive discovery, Respondents filed a motion for summary judgment in September 2000 in which they raised a variety of issues. Respondents argued in that motion that Jane Doe's claims were barred by the statute of limitations, that her claims under Title IX had to be dismissed and that there was insufficient evidence to support a civil rights claim against the school district. With respect to Petitioner's §1983 claims against the individual defendants, Respondents sought summary judgment on several grounds. The motion for summary judgment asserted that there was insufficient proof of a causal relationship between the acts of two of the defendants, Kment and Silavs, and any injury to Jane Doe. The summary judgment motion also argued that there was insufficient evidence of "deliberate indifference" to

give rise to liability against the individual defendants supervising Lomnicki.

The brief which Respondents filed in the district court in support of their motion for summary judgment was thirty pages long. On page twenty-six of that brief, the defendants mentioned for the first time the concept of qualified immunity. In their summary judgment brief the defendants cited *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and quoted the test for qualified immunity stated in that case - whether the governmental official's conduct "violate[s] clearly established statutory or constitutional rights of a person of which a reasonable person would have known." *Id.*, p. 818. Yet, other than citing *Harlow* and quoting *Harlow*'s standard for determining the existence of qualified immunity, Respondents' brief in support of summary judgment was completely devoid of any argument addressed to the question of whether the constitutional rights asserted in this case were clearly established at the time of the acts alleged in this case.

A hearing was held on Respondents' summary judgment motion on February 21, 2001. At the conclusion of that hearing, the district court ruled that material factual issues remained in dispute and it denied the motion in its entirety. (29a-30a). A written order reflecting the district court's ruling was entered on February 22, 2001. (26a).

On March 7, 2001, Respondents filed a Notice of Appeal, indicating their intent to appeal the district court's denial of its motion for summary judgment to the United States Court of Appeals for the Sixth Circuit.

Petitioner filed an emergency motion in the Sixth Circuit requesting the dismissal of the defendants' appeal on jurisdictional grounds. In that motion, Petitioner argued that

the only issue which the Sixth Circuit had jurisdiction to address was the purely legal question of whether, under *Harlow*, the individual Respondents were entitled to qualified immunity. Since Respondents had not argued in the district court that they were entitled to summary judgment under the test of qualified immunity set forth in *Harlow*, Petitioner argued that the only basis for the Sixth Circuit's exercise of interlocutory jurisdiction had been waived.

Petitioner's motion to dismiss the appeal on jurisdictional grounds was denied by the Sixth Circuit in an Order dated June 12, 2001. (23a).

Respondents' appeal proceeded on the merits. In July 2001, Respondents filed their brief in the Sixth Circuit. That brief presented extensive factual arguments, disputing at length Petitioner's factual allegations, but it contained only a single reference to the *Harlow* decision. And, like the summary judgment brief which Respondents had filed in the district court, their brief to the Sixth Circuit contained no argument that their conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person should have known," this entitling them to qualified immunity under *Harlow*. Rather than offering any argument regarding *Harlow*'s legal standard for qualified immunity, Respondents in the Statement of Issues in the brief which they filed in the Sixth Circuit characterized the questions before the Court as whether Petitioner had presented sufficient proofs to establish "that each of the five individual defendants received notice of a pattern of unconstitutional acts, demonstrated deliberate indifference to the acts, failed to take sufficient remedial action, and that such failure proximately caused injury to the plaintiff."

In the brief which she filed in the Sixth Circuit, Petitioner again argued that the Court was without jurisdiction to address the issues raised by Respondents on an interlocutory basis.

A panel of the Sixth Circuit issued its decision on July 16, 2002 (3a-22a). The panel rejected Petitioner's challenge to the court's jurisdiction. In reaching this conclusion the panel relied on prior Sixth Circuit precedent indicating that, "[t]he question whether the uncontested facts demonstrated a constitutional violation is a pure question of law - and one from which an immediate appeal can be taken where qualified immunity has been denied." (13a), *citing Turner v. Scott*, 119 F.3d 425, 428 (6th Cir. 1997).

Turning to the merits of Respondents' arguments, the panel concluded that summary judgment was appropriate as to each of the individuals named as defendants in the case. The panel ruled that summary judgment was appropriate with respect to Petitioner's claims against three of the five individual defendants (Slinde, Herron and Mayer) because Petitioner had failed to establish that "their actions demonstrated deliberate indifference to the danger of Lomnicki sexually abusing students." (19a). The panel further ruled that summary judgment should have been granted on Petitioner's claims against the remaining two individual defendants (Kment and Silavs) because Petitioner had not submitted sufficient evidence to establish that the conduct of these two individuals represented a proximate cause of Jane Doe's injuries.

Petitioner filed a timely Motion for Rehearing and Suggestion for Rehearing En Banc in the Sixth Circuit. That motion was denied in an Order dated September 19, 2002. (1a-2a).

REASONS FOR GRANTING THE WRIT

This case presents an important question regarding the scope of a federal appeal court's jurisdiction to consider an immediate appeal following the denial of a defense motion for summary judgment.

This Court held in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), that a district court decision denying summary judgment with respect to a claim of qualified immunity as defined in *Harlow, supra,* represents a collateral order, which is appealable on an interlocutory basis. The collateral order doctrine discussed in *Mitchell* allows for immediate appeal of a district court decision if that decision falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v Beneficial Industrial Loan Corp*, 337 U.S. 541, 546 (1949).

One of the essential criterion for application of the collateral order doctrine is that the issue being appealed must involve a "claim[] of right separable from, and collateral to, rights asserted in the action." 377 U.S. at 546. The Court held in *Mitchell* that a qualified immunity defense satisfied this "separability" requirement of the collateral order doctrine precisely because the legal question to be addressed under *Harlow's* immunity doctrine is separate and distinct from the merits of the plaintiff's underlying claims:

> *A claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated.* An appellate court reviewing the denial of the defendant's claim

> of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. *All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions* or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Mitchell, 472 U.S. at 528 (emphasis added).

The collateral order doctrine's requirement of "separability" is satisfied in the qualified immunity context solely because the legal issue presented under the *Harlow* test, *i.e.*, whether the defendant's conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known," is distinct from the merits of the underlying claim. Thus, precisely because the legal determination of whether a defendant violated clearly established rights "does not entail a determination of the 'merits' of the plaintiff's claim that the defendant's acts were unlawful," 472 U.S. at 529, a district court ruling on qualified immunity is subject to immediate appeal under the collateral order doctrine.

The important distinction for purposes of the collateral order doctrine between the merits of a plaintiff's claim and the purely legal question associated with qualified immunity was

later addressed by the Court in *Johnson v Jones*, 515 U.S. 304 (1995). In *Johnson*, three governmental agents who were sued under §1983 filed an immediate appeal from a district court decision denying their motion for summary judgment. These defendants had not sought summary judgment on the basis of qualified immunity. Instead, they had argued in the district court that they had no involvement in the incidents which led to the plaintiff's injury and, therefore, that plaintiff's proofs were inadequate to established their liability.

The Court held in *Johnson* that the district court's decision denying summary judgment was not subject to immediate appeal under the collateral order doctrine. While the qualified immunity issue presented in *Mitchell* was conceptually distinct from the merits of the plaintiff's claim, the "evidence sufficiency" issue sought to be appealed in *Johnson* went directly to the merits of the plaintiff's claim and, therefore, could not provide the basis for an immediate appeal under the collateral order doctrine:

> The dispute underlying the *Mitchell* appeal involved the application of "clearly established" law to a given (for appellate purposes undisputed) set of facts. And, the Court, in its opinion, explicitly limited its holding to appeals challenging, not a district court's determination about what factual issues are "genuine," Fed. Rule Civ. Proc. 56(c), but the purely legal issue what law was "clearly established."
>
> * * *
>
> Where, however, a defendant simply wants to appeal a district court's determination that the

> evidence is sufficient to permit a particular finding of fact after trial, it will often prove difficult to find any such "separate" question - one that is significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits.

Johnson, 515 U.S. at 313-314.

Thus, in *Johnson*, this Court held that, "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact." *Id.* at 319-320.

At the time *Johnson* was decided, this Court had already recognized that, in any case in which qualified immunity is raised, a court must first address whether the facts of the case as alleged by the plaintiff show that the defendant's conduct violated a constitutional right. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). As expressed by this Court in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), "a court required to rule upon the qualified immunity issue must consider then this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts addressed show the officer's conduct violated a constitutional right? This must be the initial inquiry."

This Court's decisions in *Mitchell* and *Johnson* draw a clear line between, on the one hand, an immediately appealable order denying summary judgment on the legal issue of *Harlow* qualified immunity and, on the other, a district court order which addresses the sufficiency of the evidence with respect to some other element of the plaintiff's claim, which is only appealable following the entry of a final

judgment. However, as this case demonstrates, federal appeals courts have had some difficulty distinguishing between these two types of orders.

Part of the difficulty in this area derives from this Court's holdings in *Siegert* and *Saucier* indicating that the initial inquiry in any qualified immunity issue concerns the question of whether the facts as alleged by the plaintiff establish a constitutional right. 500 U.S. at 232; 533 U.S. at 201. Since that initial inquiry is, under *Siegert* and *Saucier*, an essential component of qualified immunity, it would arguably follow that under *Mitchell*, this initial determination would be immediately appealable. However, *Siegert* and *Saucier* speak specifically to the question of whether the plaintiff has properly *alleged* a constitutional violation, not the question of whether the plaintiff has presented sufficient evidence to *prove* such a violation. Indeed, to extend the "initial inquiry" in qualified immunity cases described in *Siegert* and *Saucier* to the question of whether the plaintiff has *presented* sufficient evidence to prove a constitutional violation would implicitly overrule this Court's decision in *Johnson*.

This Court has never addressed the critical interplay between its decision in *Johnson* precluding immediate appellate review of a sufficiency of the evidence argument distinct from the purely legal qualified immunity question and its ruling in such cases as *Siegert* and *Saucier* indicating that a preliminary question in any qualified immunity case is whether the plaintiff has alleged a constitutional violation. This Court should address this question and it should reverse a Court of Appeals' determination which is obviously at odds with this Court's decision in *Johnson*. See generally Lieberman, *Post-Johnson v. Jones Confusion: The Granting*

of Back-Door Qualified Immunity, 6 B.U.Pub.Int.L.J. 567 (1997).

In *Johnson*, this Court held that, in considering the question of qualified immunity, *i.e.*, whether the defendant violated a clearly established right, a reviewing court must assume all facts in favor of the nonmoving party. 515 U.S. at 319. The Sixth Circuit has interpreted this aspect of the *Johnson* decision as providing that, "[t]he question whether the uncontested facts demonstrated a constitutional violation is a pure question of law - and one from which an immediate appeal can be taken where qualified immunity has been denied." (13a), *citing Turner v. Scott*, 119 F.3d 425, 428 (6th Cir. 1997). What the Sixth Circuit improperly held in this case, therefore, is that, as long as qualified immunity is *one* of the issues which has been raised in the district court, a federal appeals court has the right to review on an interlocutory basis *any* question of whether the uncontested facts demonstrate the violation of a constitutional right.

Thus, in the context of this case, the Sixth Circuit did not assume jurisdiction to undertake a review of the record to determine whether the defendants' conduct "[v]iolated clearly established constitutional rights of which a reasonable person would have known," under *Harlow*. Indeed, Respondents never argued in the Sixth Circuit that they were entitled to qualified immunity under *Harlow*. Instead, the Sixth Circuit reviewed the record for the purposes of determining whether Petitioner presented sufficient proofs to establish that the defendants were deliberately indifferent to the risk of harm presented (16a-20a), or whether the Petitioner presented sufficient evidence on causation to survive a motion for summary judgment. (20a-21a).

In addressing the sufficiency of Petitioner's proofs on the issues of deliberate indifference and causation, the Sixth Circuit characterized its decision as one involving qualified immunity (14a). But, it is apparent that the sufficiency of Petitioner's proofs as to deliberate indifference and causation is not the legal issue of qualified immunity described in *Mitchell*, which is separate and distinct from the merits of Petitioner's claim. Rather, the issues decided by the Sixth Circuit in this case - the sufficiency of the evidence as it bears on deliberate indifference and causation - go directly to the merits of Petitioner's claim.

By making any failure of a plaintiff's proofs in a civil rights claim "a pure question of law" (13a), the Sixth Circuit has decreed that an interlocutory appeal is available to review *any* question of whether a genuine issue of material fact exists for purposes of trial, so long as this issue arises in the context of a request for relief based on qualified immunity. This determination is directly at odds with this Court's decision in *Johnson*.

In *Johnson*, this Court held that "a district court's determination that the evidence is sufficient to permit a particular factual finding of fact after trial," 515 U.S. at 314, cannot be characterized as "separable and collateral to" the rights asserted in the action for purposes of the collateral order doctrine. Similarly, the factual insufficiencies identified by the Sixth Circuit in this case are not collateral to the merits of Petitioner's §1983 claim, they *are* the merits of Petitioner's claim.

This Court should grant the petition to review the expansive view of appellate jurisdiction promulgated by the Sixth Circuit here. This case dramatically demonstrates how expansive appellate jurisdiction is under the Sixth Circuit's

characterization of the collateral order doctrine. Here, Respondents filed a motion for summary judgment in the district court in which they raised a variety of issues. Respondents' summary judgment motion simply *mentioned* qualified immunity and it cited to the *Harlow* standard for assessing such immunity. Yet, after mentioning qualified immunity and the *Harlow* test of qualified immunity, Respondents completely failed to address in their summary judgment motion the essential issue for purposes of such immunity - whether their conduct violated clearly established law.

Since Respondents never argued that qualified immunity was available to them under the *Harlow* standard, it is not particularly surprising that their qualified immunity "arguments" were rejected. Respondents then used the denial of their qualified immunity "claim" to vest the Court of Appeals with immediate appellate jurisdiction. Once in the Court of Appeals, Respondents again completely failed to address in their brief to that court the question of whether they violated clearly established constitutional rights. Instead, Respondents attacked the sufficiency of Petitioner's evidence as it bore on the merits of her claim, including the proofs related to deliberate indifference and causation.

What occurred in this case is precisely what this Court warned against in *Abney v. United States*, 431 U.S. 651 (1977). In *Abney*, this Court held that a district court's pretrial order denying a motion to dismiss a criminal case on the basis of double jeopardy was immediately appealable under the collateral order doctrine. In reaching this conclusion, the Court emphasized that the right to seek immediate appellate review of the double jeopardy issue did not vest the appellate court with jurisdiction to consider other issues which were raised unsuccessfully in the defendant's

motion to dismiss. As the Court noted in *Abney*, "[a]ny other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeal prior to conviction and sentence." *Id.* at 663.

The Court's reasoning in *Abney* applies with equal force in this case. Here, Respondents raised in their summary judgment motion a qualified immunity defense which was destined to be denied since the essence of such a defense was not even briefed. The denial of the qualified immunity "issue" then became the basis for the Court of Appeals' immediate jurisdiction under *Mitchell*. Once in the Court of Appeals, however, Respondents abandoned any argument that their conduct violated any clearly established constitutional rights, and they concentrated their appeal on other alleged failures in Petitioner's proofs which went, instead, to the merits of Petitioner's claim. This is precisely the scenario which this Court rejected in *Abney*.

This Court should also grant the petition because the Sixth Circuit's exercise of immediate appellate jurisdiction in this circumstance is contrary to decisions reached by other federal courts. Both the Ninth Circuit in *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) and the First Circuit in *Camilo-Robles v. Zapata*, 175 F.3d 41, 47-48 (1st Cir. 1999), have held that an argument attacking the sufficiency of the plaintiff's evidence on deliberate indifference is not immediately appealable to the Court of Appeals under the collateral order doctrine. *Cf. Smith v. Brenoettsy*, 158 F.3d 908, 912-913 (5th Cir. 1998) (holding that some issues associated with deliberate indifference were reviewable immediately, while others were not separable from the merits of the case and, therefore, not appealable on an

interlocutory basis.) Similarly, other federal courts, including the Sixth Circuit itself, have held under *Johnson* that arguments relating to the insufficiency of plaintiff's proofs bearing on causation cannot be separated from the merits of the plaintiff's claim and are, therefore, not appealable until the district court action has been concluded. *Sterling v. Borough of Minersville,* 232 F.3d 190, 197 (3rd Cir. 2000); *Dickerson v. McClellen*, 101 F.3d 1151, 1164 (6th Cir. 1996) ("Since this case is before us as an appeal pursuant to *Mitchell* from a denial of summary judgment based on qualified immunity, we should not address the separate issue of proximate cause.")

For the foregoing reasons, Petitioner would request that this Court grant a writ of certiorari to review the Sixth Circuit's decision regarding the scope of its appellate jurisdiction following the denial of the Respondents' motion for summary judgment.

The decision rendered by the Sixth Circuit is incorrect jurisdictionally under this Court's decision in *Johnson*. However, even assuming *arguendo* that the Sixth Circuit had jurisdiction to review the sufficiency of Petitioner's evidence related to deliberate indifference and causation, the fact remains that the Sixth Circuit's decision is also completely erroneous on a substantive level. The panel concluded that, based on the evidence produced in this case, Petitioner did not present sufficient evidence to establish that three of the Respondents, who had supervisory control over Lomnicki, exhibited deliberate indifference to the rights of Jane Doe.

One of the Respondents, Slinde, received reports over a two year period from as many as ten girls who were students of Lomnicki that he had engaged in serious misconduct, including touching the buttocks of one girl and

sticking his hand down the top of another girl's pants and rubbing her vaginal area. Slinde's response to these reports was to order the girls in question to keep quiet about these incidents because, if they kept pressing their concerns or shared them with their parents, Lomnicki could get into serious trouble. Slinde's response to the reports of Lomnicki's sexual misconduct was to make the nine and ten year old girls who reported that misconduct feel that they had done something wrong in reporting what Lomnicki had done to them. The school district's response to Lomnicki's outrageous conduct was to transfer him to another school without advising the administrators at his new school of the serious charges of sexual misconduct which had been made against him.

Two other Respondents, Mayer and Herron, were advised of serious allegations of sexual misconduct lodged against Lomnicki by at least ten children on two separate occasions, including that he had fondled the breasts of four sixth grade girls. On each of these occasions, Respondents cited Lomnicki only for "poor judgment," and placed only a sealed reprimand in Lomnicki's file.

Finally, in early 1993, at the same time that Lomnicki had one-on-one, private interaction with Jane Doe, school officials learned that Lomnicki was being investigated for criminal sexual conduct involving a young girl. The school district was aware at this point of both the ongoing criminal investigation regarding Lomnicki and the written reprimands which arose out of his former students' allegations of sexual misconduct. Yet the district did not remove Lomnicki from his classroom duties or take any other action to protect the children assigned to his classroom for approximately two months. It was during this time period that Lomnicki engaged in the horrible acts which are the subject of this case.

The Sixth Circuit purported to apply the standard of deliberate indifference described in its prior decision, *Doe v Claiborne County, Tenn.*, 103 F.3d 495, 513 (6th Cir. 1996), whether the information any of the Respondents had regarding Lomnicki, "showed a strong likelihood that he would attempt to sexually abuse other students, such that the failure to take adequate precautions amounted to deliberate indifference to the constitutional rights of students." (19a). In the context of a summary judgment motion in which the court was required to construe all of the evidence and reasonable inferences derived from that evidence in the light most favorable to Petitioner, the Sixth Circuit seriously erred in concluding that Petitioner did not present adequate proofs as a matter of law on the issue of deliberate indifference. A reasonable trier of fact could conclude on the basis of the evidence presented that Slinde, Mayer and Herron had each exhibited deliberate indifference to Jane Doe's constitutional rights.

The Sixth Circuit's ruling that Kment and Silavs were entitled to judgment as a matter of law on the basis of an absence of proof on the question of causation was also erroneous as a substantive matter. Kment was the school official who was made aware of the criminal sexual conduct investigation involving Lomnicki in January 1993. Kment did not remove Lomnicki from his classroom and his one-on-one teaching responsibilities with Jane Doe until two months later. The panel ruled that Kment's failure to act could not have been the proximate cause of Jane Doe's injuries because "Kment had no knowledge of Lomnicki's alleged abuse of Jane until the end of 1994." (21a).

This observation misses the point. Clearly, Kment was not aware of Lomnicki's sexual abuse of Jane Doe until some time later because Lomnicki threatened Jane Doe that she was to remain silent about the abuse or he would kill her.

But, what is of importance here is not what Kment knew in 1994 when Lomnicki's abuse of Jane Doe finally came to light, but what Kment knew in January 1993, when Lomnicki was still employed as a teacher and still had a one-on-one teaching relationship with five year old Jane Doe.

Construing the evidence in the light most favorable to Petitioner, the evidence supported the view that, as of January 1993, Kment had sufficient information in his possession to remove Lomnicki from the classroom long before he did in March 1993. The evidence, therefore, reasonably supports the inference that Kment's inaction in the face of information regarding Lomnicki's sexual misconduct with young girls caused injury to Jane Doe.

The Sixth Circuit seriously erred in exercising appellate jurisdiction over the issues addressed in its July 16, 2002 decision. The Sixth Circuit also seriously erred in concluding that summary judgment was appropriate on these issues.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

01-1385

[Filed September 19, 2002]

SALLY DOE, AS NEXT FRIEND OF JANE DOE, A MINOR, Plaintiff-Appellee,	)
v.	)
CITY OF ROSEVILLE, ROSEVILLE COMMUNITY SCHOOLS, ET AL., Defendants-Appellants.	)

JUDGES:

Before SILER and BATCHELDER, Circuit Judges; and HOOD,* District Judge.

* Hon. Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-1385

[Filed July 16, 2002]

SALLY DOE, as Next Friend of JANE DOE, a minor,
Plaintiff-Appellee,

v.

CITY OF ROSEVILLE, Roseville Community Schools; JOHN KMENT; FRANK MAYER; BETTY SLINDE; LEROY HERRON; DOROTHEA SUE SILAVS, in their individual and official capacities, jointly and severally,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 99-72751. Arthur J. Tarnow, District Judge

JUDGES:

Before: SILER and BATCHELDER, Circuit Judges; HOOD, District Judge.**

OPINION

ALICE M. BATCHELDER, Circuit Judge. Defendants Betty Slinde, Frank Mayer, Leroy Herron, John Kment and Dorothea Sue Silavs, appeal the district court's order denying them summary judgment on qualified immunity grounds on the claims against them in their individual capacities under 42 U.S.C. § 1983. Those claims allege that these individual defendants deprived Jane Doe, a minor, of her constitutional right to be free from sexual abuse at the hands of a public school teacher. Because we conclude that, as to these individual defendants, Jane has not alleged the violation of an actual constitutional right, we will reverse the district court's judgment.

PROCEDURAL HISTORY

In 1999, the plaintiff, Sally Doe ("Sally"), as Next Friend of Jane Doe ("Jane"), a minor, filed this action on behalf of Jane against the Roseville Community Schools and a number of individuals in both their official and individual capacities, raising claims under 42 U.S.C. § 1983, Title IX, 20 U.S.C. § 1681(a), and various state laws for the alleged sexual abuse of Jane during 1992 and 1993. The defendants include Betty Slinde, who retired in 1986 from her position as principal of Fountain Elementary School in the Roseville School District; Frank Mayer, who retired from his position

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** The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

as Superintendent of the Roseville Schools sometime after 1988 and before 1992; Leroy Herron, former Assistant Superintendent of Roseville Community Schools who retired after 1988 but before 1992; Dorothea Sue Silavs, Roseville's Director of Special Education at the time of the alleged sexual abuse; John Kment, Superintendent of Roseville Community Schools during the alleged abuse; and John Lomnicki, Jane Doe's Chapter I reading teacher.

As we understand the complaint, Jane claims that defendant Lomnicki had a history of sexually molesting his students, and that school officials both failed to take action against Lomnicki and attempted to cover-up his history; that Lomnicki sexually molested Jane during 1992 and 1993; and that the defendants' actions and failures to act violated Jane's constitutional and statutory rights.

After extensive discovery had been conducted, the defendants--other than Lomnicki-- moved for summary judgment on the § 1983 and Title IX claims.[1] The district court heard oral argument and denied the motion. Before us on appeal is the district court's denial of summary judgment on qualified immunity grounds to defendants Slinde, Mayer, Herron, Silavs and Kment.

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[1] According to the defendants' motion for summary judgment, only the § 1983 and Title IX claims remained against these defendants, the others apparently having been dismissed.

STATEMENT OF FACTS

Lomnicki was hired as a Fountain Elementary School teacher by Roseville Community Schools in 1960. Although there is evidence that Lomnicki repeatedly molested a young male student in the mid-sixties, the Appellee does not claim that the school district was ever made aware of this conduct. The misconduct material to this appeal began in the mid-seventies.

Beginning with the 1975-76 school year, several fourth- and fifth-grade girls complained that Lomnicki had touched their legs when they were wearing dresses and put his hand down the back of their pants and up their dresses. According to one of the girls, when her father discussed the situation with then-principal Slinde, Slinde told him that "she did not see how it could be possible." Slinde testified that she spoke with Lomnicki and warned him to be very careful not to touch any children inappropriately, but she did not follow up with that particular parent, she did not document the incident or report it to anyone, and on her retirement, she destroyed all of her files, including any contemporaneous notes she might have made regarding this incident.

The following year, several fourth-grade girls alleged that Lomnicki had put his hands up their shirts and dresses, touched their buttocks, rubbed their backs, and made them sit on his lap during school in front of other children. One of these girls testified that Slinde had questioned each of them and told them that "she didn't want to hear anymore talk about it [Lomnicki's touching] and that [they] weren't to talk about it to anyone, not to tell [their] parents and if [they]

continued to talk about it, then Mr. Lomnicki would get in a lot of trouble, go to jail and die there."

Other incidents involved two fifth-grade girls, one of whom was in a classroom alone when Lomnicki came in behind her, put pieces of candy in her mouth and in each of her hands and then pulled her shirt tight and made comments about how her breasts had grown. The second girl alleged that Lomnicki had on several occasions grabbed the inside part of her leg, stuck his hand down her top all the way to her pants and rubbed her vaginal area, and picked her up by the waist, spit the gum he had been chewing into her mouth, and stuck his tongue into her mouth to obtain her gum. It does not appear from the statements and testimony of these two girls that they reported these incidents to anyone. It is undisputed, however, that Slinde did not relay the complaints that were reported to her to anyone in the administration of the school district, nor did she discipline Lomnicki in any way.

Sometime after these incidents, Lomnicki was transferred to Kaiser Elementary School, but the school was not notified of the verbal warning given to him by Slinde. In 1979, Superintendent Mayer was advised that Lomnicki had fondled the breasts of four sixth-grade girls. Mayer investigated the matter and concluded that Lomnicki exercised "poor judgment." Mayer placed a written reprimand--in a sealed envelope--in Lomnicki's personnel file admonishing him and reminding him that "you are not to straighten clothing or pick up jewelry from beneath a sweater or blouse or to touch students in a way which could be misinterpreted by them or their parents." Lomnicki was warned that "future instances of poor judgment on your part may result in more severe disciplinary action up to and including discharge."

Following this incident, Lomnicki was transferred to Arbor Elementary School, where he was assigned to a federally funded remedial reading program ("Chapter I"), in which he taught individual students, one at a time, in a private classroom. The officials at this school were not told of either the warning by Slinde or the written reprimand from Mayer. There were no reported incidents at Arbor Elementary School until nine years later when, in 1988, several sixth-grade girls reported to the school's principal that Lomnicki had been hugging them in front of other students, giving them back rubs, placing his hands in their pockets, and forcibly holding their hands between his. The principal reported the allegations to Assistant Superintendent Leroy Herron and Superintendent Mayer. Herron investigated the matter and placed a written reprimand--again in a sealed envelope--in Lomnicki's file, classifying the incident as "poor judgment" and warning Lomnicki that he was not to hug or put his hands on students in a manner that may be misconstrued by the students or their parents. Because some of the girls were giggling when Herron confronted them and did not give concrete answers to his questions, and because Lomnicki had plausible explanations for all of his conduct, Herron did not think that there was enough evidence for this incident to be considered child abuse. He did acknowledge that this was Lomnicki's second warning and recommended that in the future, Lomnicki "should not attempt to straighten out sweaters or blouses of [his] students."

Superintendent Mayer sent a confidential memo to the school board members and the school district's attorney informing them of Lomnicki's reprimand and the 1979 incident. He advised that Herron had met with Lomnicki, and that Mayer would notify the Macomb County Child Abuse

Office, place a reprimand in Lomnicki's file, and immediately transfer Lomnicki. Lomnicki was indeed transferred--to Eastland Elementary School--but again, school officials were not informed of Lomnicki's history. Again, Lomnicki was assigned to the Chapter I program.

Jane, born in 1987, encountered Lomnicki when she entered kindergarten at Eastland in 1992, and began receiving individualized reading instruction from him. Jane claims that on at least five separate occasions, Lomnicki sexually abused her. According to Jane, Lomnicki had a mask, a rope and a small wooden bat on each of those occasions. The abuse included Lomnicki's removing her clothing; touching her private parts with his hands and penetrating her vagina with his fingers; taking her into the boys' bathroom and, while wearing the mask, tying her wrists with rope, gagging her, hanging her from a hook on the door and hitting her with a small wooden bat; and--this time in the library--while again wearing a mask, putting his finger in her vagina and slapping her in the face. Jane claims that none of this abuse left any marks or bruises on her body, and that she did not tell anyone about these incidents because Lomnicki threatened to kill her if she did. Jane was unable to provide even approximate dates for any of the alleged incidents of abuse, and specifically, there is no evidence from any source that Lomnicki abused Jane during the period from January 1993, when school officials first learned that Lomnicki was under criminal investigation, until March 1993, when he was removed from the classroom (as we more fully explain below).

In late 1992 and early 1993, April Stamevski, one of the girls Lomnicki had allegedly abused in the mid-seventies, learned that Lomnicki was teaching at Eastland Elementary

School, the elementary school for the area in which Stamevski lived. Outraged, she went door-to-door to the families with children who lived on her street to warn them about Lomnicki. One of the parents whom she told about Lomnicki's abuse of her was Sally, Jane's mother. Although Stamevski did not mention the abuse in front of Jane, Sally questioned Jane about whether anyone other than Sally or Jane's sister had ever touched her in her private areas. Jane denied that anyone had.

In light of Stamevski's warning, Sally went to the school and questioned Principal Susan Enke about it. Enke apparently said that nothing of that sort happened in her school and that she would not remove Jane from Lomnicki's supervision. However, in that meeting, Enke alluded obliquely to a current criminal investigation of Lomnicki. This investigation was into charges that from 1982 until 1984, Lomnicki had molested his neighbor, Sarah Williams, who was then in the fourth and fifth grades. Apparently, Lomnicki had tutored Williams in math in her bedroom with the door closed, and during those closed-door sessions, he engaged in conduct ranging from kissing her to performing oral sex on her. Although Williams's mother had on one occasion found Williams on Lomnicki's lap, when Williams told her mother--after approximately one year of Lomnicki's "tutoring"--about the abuse, the mother did not believe her and did nothing about her report of abuse. It was not until 1992 that Williams went to the police about Lomnicki. As a result of the ensuing investigation, Lomnicki was convicted of criminal sexual conduct and sentenced to 18 to 36 years' imprisonment.

Sally's meeting with Enke apparently occurred around the same time that school officials were first becoming aware

of Sarah Williams's complaint. While the exact date is not clear from the record before us, it appears that Superintendent Kment learned that the police were investigating Lomnicki when the police requested Lomnicki's personnel file in January or February of 1993. Because Lomnicki was a tenured teacher, the school district's attorney, Ronald Greve, expressed reservations about whether the district had authority to suspend Lomnicki on the basis of the police report in the Williams matter. In early March of 1993, however, Lomnicki was removed from direct contact with students and given administrative duties in the school district's central office. The investigation into Williams's charges of sexual abuse became public in mid-March 1993.

Despite the publicity in 1993, Jane did not tell anyone about Lomnicki's actions until November 1994, when Sally again questioned Jane about whether someone had touched her. Jane initially denied it, but eventually, apparently in a highly agitated state and clutching a book that Lomnicki had given her, she told her mother that "the man that gave me this book is the man that hurt me."[2]

Sally reported Jane's allegations to school officials in December 1994. Director of Special Education Dorothea Sue Silavs filed a report with the Michigan Department of Social Services in which she stated that the alleged perpetrator of

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[2] During this time, Jane apparently displayed evidence of an abused child. She expressed anger by destroying toys, experienced nightmares, and was chronically fatigued. She was later diagnosed with Attention Deficit Hyperactivity Disorder (ADHD).

abuse was unknown but might possibly be in the household. The report noted further that

> student has recently alleged that a reading teacher abused her two years ago, but circumstances are unlikely and child is inconsistent. Investigation reveals child was evaluated and certified emotionally impaired and evaluation revealed reports of "Chuck Norris hurts me when he touches my private parts." Concern that child being abused but by whom? Someone at home?

Because of the Williams case and Jane's complaint, Dr. Emmanuel Tanay performed a psychological evaluation on Lomnicki in March 1995, at which time Lomnicki retired from the school district. The following month, Lomnicki was convicted of first and second degree criminal sexual conduct in the Sarah Williams case.

ANALYSIS

A. Jurisdiction

As a threshold matter, we must determine whether we have jurisdiction over this appeal. In *Johnson v. Jones*, 515 U.S. 304, 132 L. Ed. 2d 238, 115 S. Ct. 2151 (1995), the Supreme Court held that the district court's denial of summary judgment because the facts material to the defense of qualified immunity were in dispute was not subject to interlocutory review. 515 U.S. at 313. However, the Supreme Court acknowledged in *Behrens v. Pelletier*, 516 U.S. 299, 513 U.S. 1142, 133 L. Ed. 2d 773, 116 S. Ct. 834

(1996), that *Johnson* could not be read to mean that every denial of summary judgment is nonappealable. 516 U.S. at 313. Rather, "*Johnson* reaffirmed that summary judgment determinations *are* appealable when they resolve a dispute concerning an 'abstract issue of law' relating to qualified immunity." *Id.* (quoting *Johnson v. Jones*, 515 U.S. at 317). Moreover, in *Johnson*, the Court determined that [HN1] when a denial of summary judgment based on qualified immunity involves a legal question, a court of appeals may "take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." *Johnson*, 515 U.S. at 319. But if the district court does not identify those facts, the appellate court must "undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the non-moving party, likely assumed." *Id.* Interpreting *Johnson*, this circuit has held that "the question whether the uncontested facts demonstrated a constitutional violation is a pure question of law--and one from which an immediate appeal can be taken where qualified immunity has been denied." *Turner v. Scott*, 119 F.3d 425, 428 (6th Cir. 1997). Further, we have said that "the district court's assertion that there were genuine issues of material fact does not, standing alone, destroy the appealability of a qualified immunity ruling." *Id.*

In the case before us, the district court did not identify the facts that it assumed when it denied summary judgment to each of the five defendants claiming qualified immunity. Rather, it denied summary judgment because there were "underlying factual disputes as to the qualified immunity." Accordingly, we may review de novo the district court's decision to determine whether, viewing the facts as the

plaintiff portrays them, the defendants are entitled to qualified immunity as a matter of law.

B. Qualified Immunity

This is an interlocutory appeal of the denial of qualified immunity to each of the defendant school officials. Because qualified immunity is immunity from suit as well as from liability, we begin our review by determining "whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, . . . whether that right was clearly established at the time of the alleged violation." *Wilson v. Layne*, 526 U.S. 603, 609, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999). Here, the plaintiff's complaint claims that Jane was deprived of her right "not to have her bodily integrity violated by physical sexual abuse by a school employee."

This circuit held in *Doe v. Claiborne County, Tenn.*, 103 F.3d 495 (6th Cir. 1996), that "a schoolchild's right to personal security and to bodily integrity manifestly embraces the right to be free from sexual abuse at the hands of a public school employee." 103 F.3d at 506. In arriving at that holding, we discussed at some length the "impressive constitutional pedigree" of the right to bodily integrity, *id.*, including, among other notable precedent, *Ingraham v. Wright*, 430 U.S. 651, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977), in which the Supreme Court "declared that 'among the historic liberties' protected by the Due Process Clause is the right against 'unjustified intrusions on personal security' at the hands of the state." *Claiborne County*, 103 F.3d at 506 (quoting *Ingraham*, 430 U.S. at 673). We concluded that, although we had not theretofore addressed the precise issue,

every circuit to do so had held that the Due Process Clause of the Fourteenth Amendment protects the right of a child to be free from sexual abuse inflicted by a public school teacher. *Id.* And [HN7] we declared that "[sexual abuse under color of law] is so contrary to fundamental notions of liberty and so lacking of any redeeming social value, that no rational individual could believe that sexual abuse by a state actor is constitutionally permissible under the Due Process Clause." 103 F.3d at 507. Accordingly, we hold that at the time that Jane was allegedly abused by Lomnicki, her constitutional right to be free from such abuse was clearly established.

But this does not end the inquiry. Jane's claims against Lomnicki are not before us in this appeal, and her complaint does not contain any claim that any of these defendants physically abused her. Although her complaint appears to premise the liability of these defendants on their failure to supervise Lomnicki adequately, she does not advance that claim before us here. Rather, according to Jane's brief on appeal, she seeks to impose direct personal liability on defendants Slinde, Mayer, Herron, Silavs and Kment for violating her constitutional right to be "safe in school," a right which she claims has been established since 1949 and for which, remarkably, she cites *Wolf v. Colorado*, 338 U.S. 25, 27-28, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949).

For purposes of this appeal, we will assume that Jane's claims are in fact premised upon her right to be free from sexual abuse at the hands of a school official or teacher. Jane argues that defendants Slinde, Mayer, Herron and Kment violated that right by failing to take appropriate action in response to reports of Lomnicki's alleged abuse of children other than Jane; she argues that defendant Silavs violated that

right by filing a report containing false information with regard to Lomnicki's alleged abuse of Jane herself. By their action or inaction, Jane contends, each of these defendants demonstrated deliberate indifference to the risk of harm to the school district's children and to Jane. Our inquiry, then, is whether Jane has alleged the deprivation of a constitutional right *by these defendants*.

Regardless of how Jane attempts to characterize the liability of these defendants, it is undisputed that but for the actions of Lomnicki, Jane would have suffered no injury. This case, therefore, falls squarely within the purview of this circuit's decision in *Claiborne County*. In that case, the plaintiff claimed that school administrators had failed to take appropriate action with regard to allegations that a teacher had engaged in sexual misconduct with a number of students other than the plaintiff; that the inaction amounted to deliberate indifference to the plaintiff's constitutional rights; and the administrators were therefore individually liable for the deprivation of the plaintiff's right to be free from the sexual abuse inflicted upon her by that teacher. Because the plaintiff sought to hold school administrators individually liable for constitutional injury caused directly by someone else, we held that "'supervisory liability' standards apply to resolve the claims." *Claiborne County*, 103 F.3d at 513. Without reaching the defendants' claims of qualified immunity, we dismissed the plaintiff's claims because the facts did not support a claim of constitutional violation against the defendants.

The supervisory liability standards that we applied in *Claiborne County* are rooted in two prior cases: *Bellamy v. Bradley*, 729 F.2d 416 (6th Cir. 1984), and *Barber v. City of*

Salem, Ohio, 953 F.2d 232 (6th Cir. 1992). We noted that under that precedent, it is not enough for the plaintiff to show that the defendant supervisors were sloppy, reckless or negligent in the performance of their duties. Rather, we said, "[a] plaintiff must show that, in light of the information the defendants possessed, the teacher who engaged in sexual abuse showed a strong likelihood that he would attempt to sexually abuse other students, such that the failure to take adequate precautions amounted to deliberate indifference to the constitutional rights of students." *Claiborne County*, 103 F.3d at 513 (internal quotation marks omitted). Put another way, we said, the plaintiff must show that the "defendants' conduct amounted to a tacit authorization of the abuse." *Id.* (citing *Bellamy*, 729 F.2d at 421). We concluded that

> defendants here were simply not confronted with such a widespread pattern of constitutional violations that their actions or inactions amounted to a deliberate indifference to the danger of Davis sexually abusing students. The steps they did take, and even those they failed to take and arguably should have taken, do not show that they "encouraged the specific incident of misconduct or in some other way directly participated in it." Nor did they authorize, approve, or knowingly acquiesce in Davis's unconstitutional conduct. They had no knowledge, constructive or otherwise, that Davis was abusing Doe.

Id. (internal citations omitted).

More recently, in *Shehee v. Luttrell*, 199 F.3d 295 (6th Cir. 1999), we again addressed the issue of supervisory liability in the context of a § 1983 action. We held that liability must be based on "active unconstitutional behavior," and that a mere failure to act was not sufficient. In the absence of any allegation that the supervisors had "participated, encouraged, authorized or acquiesced in" the offending conduct, we held that the supervisors had, as a matter of law, "neither committed a constitutional violation nor violated a clearly established right." *Id.* at 300.

Other circuits have made even stronger statements with regard to supervisory liability. In *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001), for example, the Seventh Circuit held that "to be liable for the conduct of subordinates, a supervisor must be personally involved in that conduct," and "supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see." *Id.* at 651 (internal quotation marks and citations omitted). The Eleventh Circuit has held that

> supervisor liability [under § 1983] occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation. The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he [she] fails to do so. The deprivations that constitute widespread abuse sufficient to notify the

> supervising official must be obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences.

Braddy v. Florida Dep't of Labor & Employment Sec., 133 F.3d 797, 802 (11th Cir. 1998); *but see Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 254 (2d Cir. 2001) (noting that personal involvement of a supervisory official may be established by, among other things, "deliberate indifference to the rights of [others] by failing to act on information indicating that unconstitutional acts were occurring.").

Applying those standards of supervisory liability to the defendants whose appeals are before us here, we conclude, as we did in *Claiborne County*, that the facts as the plaintiff portrays them do not support a claim that these defendants deprived her of a right secured by the Constitution. Turning first to Slinde, Mayer and Herron, the three defendants who were no longer employed by the Roseville School District at the time that Jane was allegedly abused by Lomnicki, we conclude that the facts as Jane presents them do not demonstrate as to any of these defendants, that the information he or she possessed about Lomnicki "showed a strong likelihood that he would attempt to sexually abuse other students, such that the failure to take adequate precautions amounted to deliberate indifference to the constitutional rights of students." *Clairborne County*, 103 F.3d at 513 (internal quotation marks omitted). Nothing that these defendants did or did not do encouraged Lomnicki's abuse of Jane, constituted participation in that abuse, or authorized, approved or knowingly acquiesced in it. *Id.*

Viewed from the perspective of the twenty-first century, the responses of these three defendants to reports of Lomnicki's conduct are disturbing. Hindsight reveals that Lomnicki was a pedophile. But our task is not to reconstruct the reality of Lomnicki's proclivities. Our task is to determine whether defendant Slinde, a quarter of a century ago, defendant Mayer, in 1979 and 1988, and defendant Herron, in 1988, were confronted with conduct that was "obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences," *Braddy*, 133 F.3d at 802, or with "such a widespread pattern of constitutional violations," *Claiborne County*, 103 F.3d at 513, that their actions demonstrated deliberate indifference to the danger of Lomnicki's sexually abusing students. We hold that they were not. We cannot weave the threads of such a pattern on the loom of hindsight, and the facts as Jane portrays them do not demonstrate anything more than negligence on the part of these defendants. Although Jane had a constitutional right to be free from sexual abuse at the hands of a school teacher or official, she did not have a constitutional right to be free from negligence in the supervision of the teacher who is alleged to have actually abused her. [HN10] Negligence is not enough to impose section 1983 liability on a supervisor. *Clairborne County*, 103 F.3d at 513.

The remaining two defendants, Kment and Silavs, were employees of the Roseville School District at the time that Jane was allegedly abused by Lomnicki. As is the case with defendants Slinde, Mayer and Herron, we conclude that the facts as portrayed by Jane do not demonstrate that Kment or Silavs deprived Jane of a right protected by the Constitution. Defendant Silavs simply had no connection whatsoever with Lomnicki's abuse of Jane. Silavs filed a

report with the Department of Social Services, advising that Jane claimed to have been abused by her reading teacher--whom Silavs' report did not name--and indicating concern that the abuse might be coming from someone in Jane's home. This report was filed approximately eighteen months after Lomnicki's contact with Jane had been terminated. Jane points us to no authority--and we have found none--that supports the proposition that her constitutional right to be free from sexual abuse at the hands of a school official may be violated by the long-after-the-fact filing of an erroneous or even false report of the abuse.

Finally, Jane does not allege that defendant Kment violated her right to be free from sexual abuse by a school official. It is undisputed that Jane cannot identify any of the dates on which Lomnicki allegedly abused her. It is undisputed that defendant Kment was not aware of any of Lomnicki's history of alleged misconduct with female students. Defendant Kment learned no earlier than the beginning of January 1993, of the police investigation into Lomnicki's alleged abuse of Sarah Williams. By early March, Kment had removed Lomnicki from the classroom. There is no dispute that Kment had no knowledge of Lomnicki's alleged abuse of Jane until the end of 1994. The facts as Jane portrays them do not demonstrate any causal connection between any action or inaction of Kment and any injury to Jane, and therefore do not allege a violation of any constitutional right.

CONCLUSION

Because we conclude that Jane has failed to allege the violation of an actual constitutional right by any of these

defendants, we **REVERSE** the judgment of the district court denying the motions of the defendants for summary judgment on grounds of qualified immunity. We **REMAND** the matter to the district court for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 01-1385

[Filed June 12, 2001]

JANE DOE, Next of Friend of Jane Doe, a minor;
JANE DOE, a minor,

Plaintiffs-Appellees,

v.

ROSEVILLE COMMUNITY SCHOOLS; JOHN KMENT; FRANK MAYER; BETTY SLINDE; LEROY HERRON; SUE SILAVS, in their individual and official capacities, jointly and severally,

Defendants-Appellants.

JOHN LOMINICKI,

Defendant.

ORDER

Before: GUY, NORRIS, and GILMAN, Circuit Judges.

The plaintiff and her minor daughter allege that the daughter was sexually molested at school by a teacher, and they bring this action under 42 U.S.C. § 1983 and 20 U.S.C. § 1681(a) against the Roseville Community Schools and individual school officials. They argue that the school district and its officials ignored complaints regarding the teacher and thus failed to protect the student. The defendants moved for summary judgment, and the individual defendants also moved for summary judgment on the basis of qualified immunity. In a brief order, the district court denied the motion "for the reasons stated on the record." From that order, the school district and the individual defendants filed a joint notice of appeal.

Two documents are now before this court that raise issues of appellate jurisdiction. The plaintiffs move to dismiss this appeal for lack of an appealable order. Further, the defendants petition for an immediate appeal from all aspects of the district court's denial of summary judgment in addition to the denial of qualified immunity.

An individual defendant in a civil rights action may bring an interlocutory appeal from the denial of qualified immunity insofar as that decision turns upon an issue of law. *Mitchell v. Forsyth*, 472 U.S. 511 (1972). However, when the decision on qualified immunity depends on a question of fact that the district court has determined must proceed to trial, the order is not immediately appealable. *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Johnson v. Jones*, 515 U.S. 304(1995). The plaintiff argues that the defendants merely mentioned qualified immunity in their motion for summary judgment and that the district court's decision is one that is based purely upon a conclusion that factual issues remain. The defendants' motion for summary judgment and the argument before the district court suggest otherwise,

however. Further, the defendants respond to the motion to dismiss with issues that are arguably legal, not merely factual. Insofar as the plaintiff seeks an immediate dismissal of this appeal, the motion is **DENIED**. We note, however, that the determination of whether an issue is legal or factual is often entwined with the merits of the appeal, and any final determination of jurisdiction is appropriately made by the merits panel. *See Berryman v. Rieger*, 150 F.3d 561, 564 (6th Cir. 1998).

The defendants also petition this court to allow immediate appeal of all other issues implicated in the district court's denial of summary judgment. In the absence of a certification pursuant to 28 U.S.C. § 1292(b), there is no authority for such a petition. *See* Fed. R. App. P. 5; *Wiltse v. Clarkson*, 542 F.2d 363(6th Cir. 1976). The defendants' petition therefore is **DENIED**. In some cases this court has recognized that the exercise of pendent appellate jurisdiction over governmental defendants may be appropriate in limited circumstances. *See e.g. Brennan v. Northville*, 78 F.3d 1152, 1157-58 (6th Cir. 1996). To so hold at this time, however, would be premature because the exercise of such jurisdiction depends upon the merits of the indvidual defendants' appeal. However, the Roseville Community Schools has been named as a party to the appeal upon the notice of appeal, and thus no further determination of jurisdiction is necessary.

It is further **ORDERED** that this appeal be expedited. The defendants and the plaintiff may address the issues of this court's appellate jurisdiction within their appellate briefs.

ENTERED BY ORDER OF THE COURT
/S/_____

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 99-72751

[Filed February 22, 2001]

SALLY DOE, Next of Friend of JANE DOE, a Minor	)
Plaintiff,	)
v.	)
ROSEVILLE COMMUNITY SCHOOLS; JOHN KMENT; FRANK MAYER; BETTY SLINDE; LEROY HERRON; and DOROTHEA SUE SILAVS, in their individual and official capacities, jointly and severally,	)
Defendants.	)

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter was before the Court upon Defendants' Motion for Summary Judgment. The Court conducted oral

argument on the Motion on February 21, 2001. The Court has considered the written and oral arguments of the parties.

For the reasons stated on the record

IT IS ORDERED that Defendants' Motion for Summary Judgment is denied.

/s/_____

U.S. District Court Judge

APPENDIX E

Case No. 99-72751
Hon. A. Tarnow

Detroit, Michigan
[Hearing February 21, 2001]

SALLY DOE, Next of Friend of JANE DOE, a minor	)
Plaintiff,	)
v.	)
ROSEVILLE COMMUNITY SCHOOLS, et al.,	)
Defendant.	)

TRANSCRIPT OF HEARING
MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE ARTHUR J. TARNOW
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff: JULIE H. HURWITZ, ESQ.
THOMAS W. STEPHENS, ESQ.

For the Defendants: LARRY BENNETT, ESQ.
KELLIE STUTMAN DeVITO, ESQ.

...Because I know it's a preface for disagreeing, and it just wastes time.

MR. BENNETT: Then I disagree.

THE COURT: Okay

MR. BENNETT: Because you have pure speculation, and the Plaintiff does have the burden of proving that. There is no question that the law is quite adequate on that --

THE COURT: I think - - first of all, purity is good, but speculation is bad. I think there's a question of fact, and I think I'm ready to rule.

MR BENNETT: As to the individuals and the school district, Judge?

THE COURT: Yes.

MR. BENNETT: Just ready to rule?

THE COURT: Yes.

And I've already indicated in terms of the difficulty the 6th Circuit gives us in qualified immunity, their qualified

immunity juris prudence. By the way, I believe there's a case pending in the Supreme Court out of the 5th Circuit which may addlress all of this stuff this year. And as a consequence of that, I've chosen not to go to the seminar in 1983 law this year, and wait until next year to go to find out what they've said. The presumption is judges can't read advance sheets.

But because there's underlying factual disputes as to the qualified immunity, those motions will be denied. As to the Roseville School District, the motion is also denied for the reason that there are questions of fact that the jury should decide as to what, if any, their liability should be.

Is there anything more I need to say?

MR. BENNETT: I have a proposed order, Judge.

THE COURT: Granting it?

MR. BENNETT: I had one of each.

THE COURT: That's very prudent. Thank you.

Now, do we have anymore scheduling to do or is all the scheduling in place?

MR. BENNETT: -- I think you have motions in limine. These all I ...

THE COURT: The motions in limine will be done around the time of trial.

MS. HURWITZ: Actually, Your Honor, if you may, without getting real specific with dates or anything like that, because of -

THE COURT: I thought we had trial dates.

MS. HURWITZ: I'm sorry?

THE COURT: Don't we have trial dates?

MS. HURWITZ: We do have a trial date, April 24th, I believe.

THE COURT: Okay.

MS. HURWITZ: But what I would request is that the...